24 May 1989

REPUBLIC OF KOREA - RESTRICTIONS ON IMPORTS OF BEEF - COMPLAINT BY AUSTRALIA

Report of the Panel adopted on 7 November 1989
(L/6504 - 36S/202)

INTRODUCTION

1. In March and April 1988, Australia and the Republic of Korea held Article XXIII:1 consultations concerning Korea's beef import restrictions. These consultations did not lead to a mutually satisfactory solution. Australia therefore requested the Council to establish a panel to examine the matter (L/6332).

2. At its meeting on 4 May 1988, the Council agreed to establish a panel and authorized its Chairman to designate the chairman and members of the Panel in consultation with the parties concerned. Furthermore, since at the same Council meeting another panel concerning the same subject matter was set up at the request of the United States, it was decided that the Council Chairman would consult with the parties to the two Panels and with the secretariat concerning the appropriate administrative arrangements (C/M/220, item 3). Argentina, Canada, the European Community, New Zealand, the United States and Uruguay each reserved their right to make a submission to the Panel.

3. The following terms of reference were agreed upon:

> "To examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by Australia in document L/6332 and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings as provided for in Article XXIII:2."

4. In consultations among the parties it was agreed that both the Australian/Korean Panel and the United States/Korean Panel would have the same composition*, as follows:

Chairman:	Mr. Chew Tai Soo
Members:	Ms. Yvonne Choi
	Mr. Piotr Freyberg

5. The Panel met with the parties on 30 November 1988 and on 18 January 1989. It received third country submissions from Canada, New Zealand and the United States. Their views are summarized below in paragraphs 79 to 89. The Panel submitted its report on the dispute to the parties on 25 April 1989.

PROCEDURAL QUESTIONS

6. In its first submission to the Panel, the Republic of Korea argued that the complaint had been improperly brought under Article XXIII of the GATT and that the Panel should therefore declare it inadmissible. Korea requested that the Panel rule on the issue of admissibility prior to considering the merits of the complaint.

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* Later it was agreed that the New Zealand/Korean Panel on the same subject matter would also have the same composition.

7. Korea put forward the following arguments for its request: since its accession to the GATT, Korea had applied restrictions on beef, among other products, under Article XVIII:B. Korea had regularly held consultations about these restrictions pursuant to Article XVIII:12(b), under the aegis of the GATT's Balance-of-Payments Committee. The most recent report of this Committee was issued as BOP/R/171 (1987). A new round of consultations was scheduled to take place in June 1989.

8. Korea also argued that the General Agreement made specific provision for a complaint procedure in Article XVIII:12(d) if, despite the multilateral surveillance exercised pursuant to other provisions of Section B of Article XVIII, a contracting party wanted to challenge the consistency of restrictions that have been applied under this Section.

9. Korea further noted that the complaint procedures of Article XVIII:12(d) and Article XXIII differed in several important respects. For example, under Article XVIII:12(d), the complainant had to make a prima facie showing that the disputed restrictions were inconsistent with the provisions of Article XVIII:B. On the other hand, Article XXIII merely required a showing of nullification or impairment of benefits of the complainant, which was not dependent on a showing of inconsistencies with the General Agreement. There were valid reasons for these differences. When countries applied restrictions under Article XVIII:B and held regular consultations concerning these measures with a qualified GATT Committee that took into account the relevant findings of the International Monetary Fund, they had a legitimate expectation that these measures could not simply be challenged under the relatively loose requirements of Article XXIII regarding nullification or impairment. Otherwise, the exercise of multilateral surveillance pursuant to Article XVIII:B became meaningless.

10. The Panel decided to make an immediate

FACTUAL ASPECTS

11. The case before the Panel concerned measures maintained by the Republic of Korea on imports of beef (CCCN 02.01).

(a) General

12. Since its access

consultations. The representative of Korea stated that he could not prejudge the policy of the next Government in this regard".[3] Moreover, members of the Committee had stated that "they did not necessarily expect Korea to disinvoke Article XVIII:B immediately …".

16. Economic indicators in Korea since its latest BOP consultations showed a continuation of the favourable economic situation of the recent past. Economic growth for the period January-September 1988 was expected to have reached 12 per cent as compared to the same period in 1987. Terms of trade improved by 2.5 per cent during the first nine months of 1988 while unemployment dropped from 4 per cent in 1985 to 2.6 per cent for the period January-September 1988. As regards BOP, the current account for the first nine months of 1988 showed a favourable balance of US$14.1 billion, compared to US$9.9 billion for the whole year of 1987. Official reserves (gross) passed from US$3.6 billion at the

restrictions on quantity. These arrangements were published in a consolidated public notice (the Export and Import Notice). Meat and edible offals were classified in 1967 as restricted items for the purposes of the Foreign Trade Transaction Act. As restricted products, beef could be imported on the recommendation of the National Livestock Cooperatives Federation (NLCF) subject to the guidelines of the Ministry of Agriculture, Forestry and Fisheries (MAFF), which controllich

Chairman, Pusan Livestock Cooperative
Vice-President for Marketing, National Agricultural Cooperative Federation
Chairman, Baekam Agricultural Cooperative
President, National Headquarters for Korea Dietary and Life Improvement Campaign
Chairman, Korea Dairy and Beef Farmers Association
Professor, Livestock College, Kunkook University
Research Director for Agricultural Development, Korea Rural Economic Institute
Professor, College of Agriculture, Seoul National University
President, LPMO
Chairman, Tourist Hotel Subcommittee, Korea Tourism Association

Article XI:1

27. Australia argued that the Korean Government's decisions regarding beef imports had been based solely on the domestic supply and demand situation and industry protection considerations. Therefore, the restrictions had to be judged under the provisions of Article XI. Australia also argued that the quantitative restrictions and import ban maintained by Korea since 1984/85 on imports of beef were prima facie inconsistent with the GATT under the provisions of Article XI:1 which proscribed "prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures". Australia maintained that the restrictions could not be justified under the exemption provisions of Article XI:2 since they were not measures necessary to the enforcement of government efforts to restrict the amount of domestic beef permitted to be marketed or produced, or to the removal of a temporary surplus by making this available to certain groups of consumers at less than market prices.

28. Although the Korean Government had often referred to its import regime covering the period from end-1984 until the second half of 1988 as a "suspension of imports", this, Australia argued, did not alter the fact that no commercial imports of beef were

the Korean authorities had still to take a decision on the arrangements to apply in the future to beef imports for hotel use. The price equalization mechanism resulted in an excessive monopoly return which effectively increased protection beyond that provided by the bound duty. Australia also pointed out that the impact of such a mechanism was uneven in that the percentage mark-up was generally lower on the more expensive cuts/types of beef and on beef imported from higher-priced sources and conversely higher on beef in the categories traditionally imported from Australia.

32. In conclusion, Australia considered that the LPMO was an authorized import monopoly in terms of Article II:4 and that the application of the price mark-up on imports by the LPMO was in contravention of Article II:4 and in excess of Korea's import tariff on beef which was bound at 20 per cent ad valorem.

33. Korea replied that it was important to stress at the outset that the LPMO mechanism did not represent a separate import restriction. The LPMO simply had no authority to set or modify quantitative limitations on beef imports. Nor was the LPMO charged with making recommendations to the Korean Government on the appropriate level of imports. Rather, the LPMO administered the importation of beef within the framework of quantitative restrictions set by the Government. Since the LPMO was just an implementing mechanism, the LPMO's objectives did not affect the justification of the Government's restrictions on beef imports. As concerned the Livestock Development Fund, the NLCF administered expenditures from this Fund under instructions

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something had never been done, there was some de facto "agreement" that this represented an accepted practice that it could not or should not be done. An alternative, and more plausible, conclusion was that a situation had not yet arisen in which recourse to the procedures of Article XXIII was considered to be necessary. Indeed, Australia was not aware of any agreement,

Article XXIII would supersede the special review procedure of Article XVIII:12(d), thus amounting to an improper amendment of the GATT in violation of Article XXX.

43. Consequently, Korea argued, in accordance with the long-standing practice of the CONTRACTING PARTIES, Australia was not entitled to complain about the possible inconsistencies of the disputed beef restrictions with provisions of the General Agreement pursuant to Article XXIII:1(a). Instead, Australia would have to show that Korea's restrictions on beef imports constituted "non-violation" nullification or impairment under Article XXIII:1(b) or (c). In Korea's view, there was no hard and fast rule as to how a showing of "non-violation" nullification or impairment was to be made. What was clear was that the complaining party had to provide a "detailed justification".[11] To date, Australia had not provided any such justification.

44. Referring again to the Citrus case mentioned above, Korea argued that the panel arrived at its conclusion of "non-violation" nullification or impairment by inquiring whether, inter alia, the disputed restrictions could have been reasonably anticipated by the United States, the complaining party. This panel did not find that the disputed measures could not have been reasonably anticipated by the United States.[12]

to make submissions to the panel on this issue. And as in the present case, these terms did not exclude review of Article XVIII:12(d) in relation to Article XXIII. Accordingly, the fact that Korea was a party to the consensus establishing the terms of reference in the Indian Almonds case in no way prevented Korea from raising the relationship between Article XVIII:12(d) and Article XXIII as the fundamental issue which it was. The same argument was made with respect to Korea's agreement with the terms of reference of the present Panel.

49. Korea argued that none of the GATT precedents addressed the fundamental issue in this case. If the complaint of Australia were to be reviewed under Article XXIII, no country would even consider invoking Article XVIII:12(d). Korea had pointed out that Article XVIII:12(d) made it rather difficult for a country to complain about a BOP measure that had been reviewed by the BOP Committee. In fact, the requirements of this provision were rather more difficult to satisfy for a complaining country than the requirements of Article XXIII. There were good reasons for these differences. When countries applied

52. Australia replied that Korea's BOP situation had been subject to only two full consultations withtions

discussions. The Government of Korea had consistently urged that the issue be kept at the bilateral level in recognition of the domestic political sensitivity of the beef access issue, particularly in 1987.

56. Korea then argued that when the CONTRACTING PARTIES agreed to establish a panel, they limited its terms of reference to examining Korea's import restrictions on beef. Yet, these restrictions were part of a series of restrictions that remained to protect Korea's balance of payments. Accordingly, findings on the justification of Korea's restrictions on beef imports under Article XVIII:B were likely to reflect on the justification of these other restrictions as well. These latter, however, fell outside this Panel's terms of reference. Also, Korea could not agree to the challenge of all its BOP restrictions on the basis of the present Australian complaint. Assuming, nevertheless, that the Panel were to feel it could distinguish the restrictions on

an expert in the past they were not

66. Australia argued that Korea did not meet the appropriate requirements for coverage of its beef import measures under Article XVIII:B. Recognizing that recourse to Article XVIII:B was a legitimate right of developing countries in times of BOP difficulties, Australia considered, however, that the Korean beef import regime contravened both the spirit and the letter of Article XVIII:B, paragraphs 9, 10, 11 and 12(a), as well as the 1979 Declaration on Trade Measures Taken for Balance-of-Payments Purposes.[22] Firstly, Australia maintained that Korea had implemented an effective prohibition rather than a restriction on beef imports from 1984 to 1988. The wording of paragraph 9 of Article XVIII:B made it quite clear that the right of a contracting party to impose import restrictions consistent with the provisions of this paragraph was not an unqualified right, but was dependent on the restrictions not exceeding those necessary to achieve the objectives specified. Furthermore, such restrictions had to conform to paragraphs 10, 11 and 12 of Article XVIII. The nature of Korea's beef import regime from at least 1984 onwards was demonstrably not necessary to achieve the specified objectives. In 1984, the year in which Korea ceased to hold tenders for beef to be imported through the NLCF, it met none of the requirements of paragraph 9. The effective prohibition on beef imports took place at the same time as import controls on a wide range of other products, which had been imposed earlier for BOP purposes, were being removed. The statement of the IMF representative at the December 1987 BOP Committee consultations with Korea[23] confirmed that Korea's actions with respect to beef since 1984 had been contrary to its actions with respect to other sectors of its economy. Korea had been pursuing a programme of import

74. Korea submitted that the 1984/1985 intensification measures could not be isolated and divorced from their BOP context. One should look at the

justification for more than two decades until the panel invalidated them at Hong Kong's request. Similarly, Japan had already abandoned BOP cover in 1962 for its restrictions on leather, more than two decades before the United States brought the complaint. Korea, on the other hand, had not abandoned BOP cover for its beef restrictions; nor had the IMF or the BOP Committee to date obliged Korea to disinvoke Article XVIII:B. In other words, the present case did not concern residual restrictions at all. Moreover, neither the Hong Kong Quartz Watches nor the Japanese Leather cases concerned a grace period to retract intensification measures to the level of the BOP restrictions that continued to be justified under Article XVIII:B.

Article XXIII

78. Australia argued that the violation by Korea of provisions of Articles XI and II of the General Agreement constituted a prima facie case of nullification or impairment of benefits accruing to Australia under the General Agreement.

SUBMISSIONS BY OTHER CONTRACTING PARTIES

79. The Panel received submissions from Canada, New Zealand and the United States as interested third countries. New Zealand and the United States both stated that their interests as exporters of bovine meat to the

83. The United States considered that the Korean measures could not be justified under Article XVIII:B since Korea did not have a BOP problem as defined by the GATT. If, however, it was considered that Korea could restrict imports for BOP reasons, the United States argued that the restrictions on beef imports did not qualify as BOP measures since, inter alia, these measures were

the 10-11 November 1987 GATT Council meeting, Canada indicated that it did "not accept the position put forward by some contracting parties that review - including full review of trade restrictions - by the BOP Committee constituted acceptance of such measures as being GATT consistent". The change from a ban on beef imports during the period 1984-1988 to import restrictions which were in any case contrary to the GATT, was not in keeping with the decision of the BOP Committee following the 1987 consultation with Korea.

FINDINGS AND CONCLUSIONS

90. The Panel noted that Australia claimed

view that the compatibility with the General Agreement of Korea's import restrictions could not be challenged under Article XXIII becau

restrictions

Article II, as claimed by Australia. The Panel noted Korea's view that the operation of the LPMO was consistent with the provisions of Article II:4.

103. The LPMO bought imported beef at world market prices through a tender system and resold it either by auction to wholesalers or directly to end users. A minimum bid price at wholesale auction, or derived price for direct sale, was set by the LPMO with reference to the wholesale price for domestic beef.

104. In examining Article II:4, the Panel noted that, according to the interpretative note to Article II:4, the paragraph was to be applied "in the light of the provisions of Article 31 of the Havana Charter".[30] Two provisions of the Havana Charter, Articles 31:4 and 31:5, were relevant. Article 31:4 called for an analysis of the import costs and profit margins of the import monopoly. However, Article 31:5 stated that import monopolies would "import and offer for sale such quantities of the product as will be sufficient to satisfy the full domestic demand for the imported product …" (emphasis added). In the view of the Panel, Article 31:5 clearly implied that Article 31:4 of the Havana Charter and by implication Article II:4 of the General Agreement were intended to cover import monopolies operating in markets not subject to quantitative restrictions.

105. Bearing in mind Article 31:5 of the Havana Charter, the Panel considered that, in view of the existence of quantitative restrictions, it would be inappropriate to apply Article II:4 of the General Agreement in the present case. The price premium obtained by the LPMO through the setting of a minimum bid price or derived sale price was directly afforded by the situation of market scarcity arising from the quantitative restrictions on beef. The Panel concluded that because of the presence of the quantitative restrictions, the level of the LPMO's mark-up of the price for imported beef to achieve the minimum bid price or other derived price was not relevant in the present case. Furthermore, once these quantitative restrictions were phased out, as recommended by the Panel in paragraph 109 below, this price premium would disappear.

106. The Panel stressed, however, that in the absence of quantitative restrictions, an import monopoly was not to afford protection, on the average, in excess of the amount of protection provided for in the relevant schedule, as set out in Article II:4 of the General Agreement. Furthermore, in the absence of quantitative restrictions, an import monopoly was not to charge on the average a profit margin which was higher than that "which would be obtained under normal conditions of competition (in the absence of the monopoly)". See paragraph 4.16 of the report of the Panel on Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies (L/6304) adopted by the CONTRACTING PARTIES in March 1988. The Panel therefore expected that once Korea's quantitative restrictions on beef were removed, the operation of the LPMO would conform to these requirements.

107. The Panel then examined Australia's contention that Korea imposed surcharges on imported beef in violation of the provisions of paragraph 1(b) of Article II and noted that Korea claimed that it did not impose any surcharges in violation of Article II:1(b). The Panel was of the view that, in the absence of quantitative restrictions, any charges imposed by an import monopoly would normally be examined under Article II:4 since it was the more specific provision applicable to the restriction at issue. In this regard, the Panel recalled its findings in paragraph 105 above. It concluded, therefore, that it was not necessary to examine this issue under Article II:1(b).

[30]The text of Article 31, and its interpretative note, is contained in Annex III.

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ANNEX I

Extract from the Report

ANNEX II

KOREA: SUMMARY OF ECONOMIC INDICATORS

	1985	1986	1987	Jan-Sept 1988	1985/84	1986/85	1987/86	Jan-Sept 1988/87
	(Billion won)				(Percent changes)			
GNP (1980 constant prices)	52,705.4	59,187.8	66,319.6	51,369.6	5.4%	12.3%	12.0%	12.0%
Real Domestic Demand	54,960.7	59,540.6	65,590.3	50,184.9	4.0%	8.3%	10.2%	11.0%
Consumption	37,191.6	39,888.6	42,976.2	33,654.5	5.1%	7.3%	7.7%	8.1%
Gross capital formation	17,769.1	19,652.0	22,614.1	16,530.4	1.6%	10.6%	15.1%	17.4%
Export of goods and non factor services	20,279.5	25,648.1	31,809.0	26,117.3	2.1%	26.5%	24.0%	12.3%
Imports of goods and non factor services	20,124.1	23,852.7	28,899.6	24,140.9	- 1.7%	18.5%	21.2%	14.9%
					(Average, twelve month percent change)			
Prices, Wages and Employment								
Consumer prices	100.0	102.8	105.9	112.7	2.5%	2.8%	3.0%	7.1%
Terms of Trade	100.0	108.8	111.5	114.3	0.5%	8.8%	2.5%	2.5%
Nominal earnings in manufacturing 1)	269.7	294.5	328.7	364.8	9.9%	9.2%	11.6%	21.1%
Unemployment rate	4.0	3.8	3.1	2.6	4.0%	- 5.0%	- 18.4%	- 23.5%
	(Billion won)				(Percent of GNP)			
Public Sector								
Revenue	14,223.5	16,278.6	19,270.5	18,007.6	27.0%	27.5%	29.1%	35.1%
Expenditure	13,585.0	15,310.5	18,364.6	14,375.9	25.8%	25.9%	27.7%	28.0%
	(Billion won)				(Twelve month percent change)			
Money and Credit								
Money and quasi-money	28,565.2	33,833.1	40,279.5	42,714.6	16.8%	18.4%	19.1%	18.3%

Source: Monthly Statistical Bulletin, November 1988, The Bank of Korea.
International Financial Statistics, December 1988, IMF.

1) In '000 won. 1988: January-July. 2) Reflects changes in the net foreign assets of the banking system.

KOREA:

ANNEX III

demand for the imported product, account being taken of any rationing to consumers of the imported and like domestic product which may be in force at that time.

6. In applying the provisions of this Article, due regard shall be had for the fact that some monopolies are established and operated mainly for social, cultural, humanitarian or revenue purposes.

7. This Article shall not limit the use by Members of any form of assistance to domestic producers permitted by other provisions of this Charter.

ad Article 31

Paragraphs 2 and 4

The maximum import duty referred to in paragraphs 2 and 4 would cover the margin which has been negotiated or which has been published or notified to the Organization, whether or not collected, wholly or in part, at the custom house as an ordinary customs duty.

Paragraph 4

With reference to the second proviso, the method and degree of adjustment to be permitted in the case of a primary commodity which is the subject of a domestic price stabilization arrangement should normally be a matter for agreement at the time of the negotiations under paragraph 2(a).